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In The Supreme Court of the United States

October Term, 1998

JERRY L. LEWIS AND LORRAINE LEWIS,
Petitioners,

v.

GTE NORTH, INC.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Are local telephone companies to be held to the plain meaning of 18 U.S.C. Section 2520(a)'s provision "[e]xcept as provided in Section 2511(2)(a)(ii)" when voluntarily assisting local law enforcement in an illegal wiretap?

2. When can a local telephone company provide direct assistance to local law enforcement acting without a warrant or other lawful certification without violating 18 U.S.C. Sections 2511(2)(a)(ii) and 2520?

3. Whether a local telephone company is responsible under either 18 U.S.C. Section 2520 or 42 U.S.C. Section 1983 along with local law enforcement for installing wiretaps, when the telephone company knows that no warrant or other lawful certification has or will be obtained?

4. Are Petitioners entitled to protection from and a remedy for a local telephone company acting on behalf of or in furtherance of illegal wiretapping with knowledge of the illegality?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are Jerry L. Lewis and Lorraine Lewis, husband and wife, residing in Minerva, Ohio and GTE North Inc. the local telephone service provider to the Village of Minerva, Ohio. The other Defendants Village of Minerva, Richard Taff and David Harp are not parties to this proceeding before this Court.

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No. 99-___

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

JERRY L. LEWIS and LORRAINE LEWIS,

Petitioners,

v.

GTE NORTH INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

Petitioners pray that a writ of *certiorari* issue to the United States Court of Appeals for the Sixth Circuit to review the judgment in this case filed on October 28, 1998.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is an unreported and not recommended for full-text publication *per curiam* affirmance of the district court opinion. It is reprinted in the Appendix at A 1 - A 2.

The opinion of the United States District Court for the Northern District of Ohio of July 12, 1996 (Appendix at A 3 - A 63) is unreported; the opinion of August 19, 1996 finding the judgment appealable (Appendix at A 64 - A 69) is unreported; the opinion of August 23, 1996 (Appendix at A 70 - A 71) denying reconsideration of summary judgment to GTE North Inc.; and the decision of the trial court of August 26, 1996 [punitive damages against other defendants] is reported at 934 F.Supp. 268 (N.D. Ohio 1996) (Appendix at A 72 - A 84).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254(1) to review a civil judgment. The judgment was entered on October 28, 1998.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. Section 2520(a).

Recovery of civil damages authorized

(a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. Section 2520(d).

(d) Defense.--A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. Section 2511(2)(a)(ii).

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other

persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in Section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with –

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a state, as may be appropriate. Any such disclosure shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance

with the terms of a court order or certification under this chapter.

42 U.S.C. Section 1983.

Civil Action for deprivations of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In February, 1992, Richard Taff, then Police Chief of the Village of Minerva in the State of Ohio, targeted Police Sergeant Jerry L. Lewis[1] as part of a personal campaign to remove Petitioner from the Minerva Police Department. In order to "catch" Petitioner Jerry Lewis, Chief Taff solicited Respondent GTE North, Inc. ["GTE"] to install wiretaps on

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[1] Jerry L. Lewis and his spouse Lorraine Lewis were the Plaintiffs below and are the Petitioners in this Court.

two (2) of the three (3) administrative general lines of the Village of Minerva[2].

GTE is the local telephone company for the Village of Minerva. Chief Taff[3] approached the local manager of GTE and told GTE's manager the purpose of the wiretaps. GTE never received any warrant, court order or even a promise of a court order. Based solely on an oral request GTE connected two (2) administrative lines to open recording tracks on the 24 hour reel to reel recording system.

GTE's local manager met with Taff at Minerva's municipal building to discuss installing the intercepts on the administrative lines. Following this meeting, GTE dispatched a technician to connect the intercepts. Upon inspection of the connections required to install the intercepts to the first two (2) lines, GTE's told Chief Taff that a specific kind of "punchdown" tool would be needed. Within a week, Chief Taff called GTE's technician directly and advised him that he

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[2] The Village of Minerva's municipal complex, including city hall, police department and jail are part of an interconnected structure of varying ages.

[3] During discovery Chief Taff invoked the Fifth Amendment to any inquiries relating to the wiretaps due to the potential criminal violations, therefore all of his conversations with GTE are reported by GTE employees who spoke with Taff.

had obtained the proper tool. GTE's technician then returned to the Minerva municipal complex and installed the intercepts on two (2) of the three (3) administrative lines of the Village in late February of 1992.

GTE dispatched the same technician approximately one (1) year later in March of 1993 to connect the final unrecorded administrative telephone line of the Village of Minerva to the recording equipment. The intercepts and the continuous surreptitious recording went on until January 26, 1994, when the village manager ordered the wiretaps removed. GTE's local manager knew the purpose, inspected the premises, spoke to Chief Taff, and dispatched a GTE technician to make the requested installation[4]. During the entire existence of the actual illegal wiretaps GTE concealed their existence by making no records. GTE made no work orders of any of the wiretap connections.

GTE had explicit and longstanding internal directives and practices in place which require referral of all local law enforcement requests related to wiretaps to GTE's Security Department. GTE ignored every one of these policies completely in Minerva. No report was ever made to GTE's

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[4] *GTE dispatched the very same technician to remove the intercepts in 1994.*

Security Department concerning the wiretap assistance requested, their installation or their existence. GTE received no court order, warrant, or other lawful written certification from local law enforcement from the date of the first request for a wiretap in early 1992 up to and through the Village Manager's disconnect order in late January of 1994.

Minerva's tapped telephone lines are routinely used by village employees, residents and by on-duty police officers after normal business hours for placing non-police telephone calls. Officers and others used one or more of the administrative lines on a daily basis for personal telephone calls. Appendix at A 30.

During the meeting with Williams, GTE's local manager, Defendant Taff did not identify a specific crime that he was investigating, and failed to specify the duration of the wiretaps. GTE was not presented with any court orders, warrants or other written emergency certifications for nearly two (2) years. GTE made no inquiry of Taff or other effort to determine whether or not a warrant or court order had been obtained or would be obtained. Appendix at A 52.

The trial court found liability for unlawful wiretapping by all defendants below, except GTE, in its July 12, 1996, opinion. Appendix A 27-61. The trial court granted summary

judgment to GTE's on all claims. On appeal the Sixth Circuit affirmed the decision of the district court. GTE would have us ignore its "guilty knowledge" about the purpose and installation of the wiretaps. No statutory defense is applicable to GTE: there was no monitoring for quality of service. Appendix A 33 - A 38. GTE has avoided the consequences of its guilty knowledge of the illegal wiretaps by advancing speculation about whether a lawful basis might exist for the request to install intercepts. This requires us to ignore GTE's exact knowledge of the purpose of the intercepts GTE installed.

On July 12, 1996, the trial court issued a Memorandum Opinion granting summary judgment to Defendant GTE on both the federal wiretap and Section 1983 claims. The Order stated: "The motion of GTE North, Inc. ... is granted in all respects." Appendix A 63. As to Defendants Taff, Harp and Minerva liability was found on the wiretap claims.[5] Upon entry, the July 12, 1996, Judgment Entry was not final and appealable. Thereafter, on July 24, 1996 Plaintiffs moved pursuant to Rule 54(b), Federal Rules of Civil Procedure for an Order allowing an immediate appeal

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[5] All other Defendants entered into a settlement on or about October 6, 1996 with Petitioners.

of the GTE order. On August 19, 1996 the trial court issued an Order granting Plaintiffs' Rule 54(b) motion, indicating that there was no just reason for delay. On August 23, 1996 Plaintiffs filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals affirmed the decision of the district court in a *per curiam* opinion issued on October 28, 1998.

Petitioners submit that the basic facts are not in dispute. GTE attempts to escape all responsibility and liability, where it had full knowledge of the intended purposes of the wiretaps and nonetheless voluntarily assisted local law enforcement with the wiretapping.

ARGUMENT

The precedent created by this case allows, for the first time, anywhere in the United States a telephone company or other service provider can, with full knowledge of the illegality of a proposed wiretap, install and maintain the taps covertly without incurring any statutory or constitutional liability. The precedent set by this decision presents issues of national importance on the vitality of Title III's protection to citizens of this country. The Sixth Circuit failed to address the issue presented by simply affirming the lower court in a *per curiam* opinion. Petitioners submit that the decisions

below have turned Congressional intent on its head and will corrupt or eliminate the very protection Title III meant to provide.

Without this Court's guidance the present statutory construction and/or interpretation will establish a precedent which renders significant portions of Title III superfluous. Under the decision below, any local telephone company can, without risk of liability under Title III, give assistance up to and including installing and concealing the existence of warrantless wiretaps for local law enforcement. In this case GTE had actual foreknowledge of the illegal purpose of the wiretaps it was asked to connect. Appendix A 8 - A 10.

A telephone company is either prohibited as a matter of law from cooperating with law enforcement authorities in providing wiretap assistance unless they fully meet the requirements of Section 2511(2)(a)(ii) or these restrictions are discarded. A local telephone company, such as GTE here, may give direct assistance to local law enforcement to install, and conceal illegal intercepts without any consequence.

The court should prohibit telephone companies from wiretapping with knowledge of the illegal nature of the wiretapping requested by local law enforcement. The local

telephone company can now evade losing the benefits of the statutory defenses and exemptions by saying we didn't listen. Title III is crippled with no clear delineation of the inter-related meanings of the various statutory requirements. The critical inquiry is as a matter of law can the local telephone company fail to comply with the requirements of Section 2511(2)(a)(ii) and continue to benefit from the statutory defenses on liability. The procedural posture of this case is perfectly suited to decide this issue of first impression.[6]

I. The Special Position Granted to Local Service Providers Under the Wiretap Laws Imposes Special Obligations as Well.

Telephone companies enjoy special benefits and defenses under Title III. Based upon the decisions in this case the special protection has been converted to special privileges emasculating federal wiretap law. In many instances service providers have been given special defenses such as in Section 2520(d) provided the telephone company lives up to its statutory obligations to all citizens. In 1968, this Court recognized constitutional protection

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[6] The grant of summary judgment flows from the misapprehended statutory interpretation and reversal will allow the facts to be considered under the proper substantive law.

against wiretaps by law enforcement officials. Congress went on to enact a comprehensive scheme regulating wiretapping and electronic surveillance, to-wit Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. Sction 2510, *et seq.* Title III permits the interception of private wire communications by law enforcement authorities, but **only** when judicial approval is obtained under stringent conditions, *Gelbard v. United States*, 408 U.S. 41, 46, 92 S.Ct. 2357, 2360 (1972), and **only** under extraordinary circumstances. *United States v. Ojeda Rios*, 495 U.S. 257, 260, 110 S.Ct. 1845, 1847 (1990). This Court observed in *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), that " '[t]he purpose of the legislation ... was effectively to prohibit ... all interceptions of oral and wire communications, except those specifically provided for in the Act....' ", and concluded that Title III "quite clearly expresses a blanket prohibition on all electronic surveillance" not specifically authorized by the Act.

The extraordinary safeguards against unauthorized wiretaps imposed in 1968 have been repeatedly reaffirmed up to and including amendments more recent than the

ECPA[1] in 1986. The exception created in this case vitiates the clear recognition of the value our society places on protecting the privacy of communications.

Focusing only on Sections 2510(4) and 2520, the trial court concluded that, "No rational jury could find that GTE's role in this controversy can be characterized as an 'interception' of the telephone calls of the plaintiffs." Appendix at A-54. 18 U.S.C. § 2510(4), 2520. This narrow view of the statutory scheme omits any consideration of the very provisions providing special treatment to local service providers under Title III. GTE's conduct is directly governed by other statutory provisions of Title III. In pertinent part, Section 2511(2)(a)(ii) provides:

> .... No cause of action shall lie in any court against any provider of wire...communication service, its officers, employees or agents,...for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

18 U.S.C. Section 2511(2)(a)(ii). Congress gave protection to telephone companies clearly in exchange for their vigilance under and compliance with Section 2511(2)(a)(ii). Indeed, no person or other entity is in a better position to do

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[1] *Electronic Communications Privacy Act of 1986, PL*

so. This section of Title III provides broad protection to any local telephone or service provider, provided a court order or other lawful written certification is received with appropriate instructions for the period of time the assistance is required.

The pervasive theme of federal wiretap law is that electronic surveillance should be sharply curtailed and in no instance be undertaken without strict judicial authorization and supervision. See, *U.S. v. Giordano*, 416 U.S. 505, 514, 519 n. 8, 94 S.Ct. 1820 (1974). Thus, it is not surprising that this section expressly speaks to the obligations and immunities of a service provider, like GTE, in a single section. The requirement is that a local service provider act in accordance with a lawful order or certification, neither of which were present here. Petitioners submit that no rational jury could find that GTE's role in this controversy was in compliance with Section 2511(2)(a)(ii)(A) or (B). 18 U.S.C. Section 2511(2)(a)(ii)(A), (B).

II. The Interpretation Adopted Below In Effect Constitutes a Judicial Amendment to and Repeal of the Federal Wiretap Act.

Congress enacted Title III with the dual purpose of: (1) protecting the privacy of wire communications, and (2)

delineating on a uniform basis the circumstances and conditions under which the interception of such communications may be authorized. S.Rep. No. 1097, 90th Cong., 2d Sess.(1968), Reprinted in 1968 U.S.Code Cong. & Admin. News pp. 2112, 2153 (hereinafter cited as S.Rep. No. 1097 with page references to 1968 U.S.Code Cong. & Admin. News). The court below was wrong in concluding that GTE's conduct met either the statutory language or legislative intent of Title III.

The court below interpreted Title III to negate any liability and overrule Congress's statutory purpose of Title III. This creates a precedent that threatens to swallow the carefully drafted purposes and exceptions for protection of not only the Petitioners in this case, but also for all citizens under Title III. Title III requires that a local telephone company **not** engage in cooperation with local law enforcement where it knows that the wiretaps do not comply in any manner with the statute. The error is in assuming that the telephone company or other local service provider is in the same position even when it knows the illegal purpose. Under the decision below, Title III's requirements are abrogated and reduced to the simplest inquiry did the telephone company actually listen to the intercepted

communications. Appendix at A54 - A55. If not, the telephone company has no responsibility under Title III.

Congressional intent clearly favors the recovery of civil damages as the central theme of remedy for citizens under Title III, and the ECPA. [Electronic Communication Privacy Act of 1986, P.L. 99-508] The decision below fails to give vitality to all parts of Title III including Section 2520(a). 18 U.S.C. § 2520(a). The introductory clause of Section 2520(a), ignored below, provides "[e]xcept as provided in Section 2511(2)(a)(ii)", any person whose electronic communication is intercepted in violation of this law may recover from the entity which engaged in that violation such relief as may be appropriate. The court disregarded not only the introductory clause, but also disregards the "entity which engaged in that violation". The entity herein, GTE, had engaged in conduct which (1) assisted law enforcement without a court order or certification and (2) furthered and effectuated the violation of Title III by Defendants Taff, Harp and Minerva. GTE returned a year later and installed an additional unauthorized wiretap to the Village's final administrative line. Appendix at A 8 - A 9.

In this case the trial court found that Petitioners' wire communications were routinely and pervasively intercepted in violation of Title III. Appendix at A 60 - A 63. All other entities and individuals engaging the violations of Title III have been found liable. Only GTE, the telephone company, has escaped culpability when it knew of the illegality. The current decision requires no compliance with Section 2511(2)(a)(ii).

Section 2511(2)(a)(ii) is directed solely at the conduct of local service providers. Petitioners urge that GTE's role in the illegal wiretaps must be viewed in the context of Section 2511(2)(a)(ii) in its entirety or an exception of gargantuan proportions is opened in Title III. Section 2511(2)(a)(ii) is the primary shield given by Congress to telephone companies for knowingly cooperating with local law enforcement. Under this case telephone companies are free to ignore statutory restrictions and knowingly provide assistance.

GTE is authorized to provide technical assistance to persons authorized by law to intercept wire communications, if GTE or its managers or employees are provided with a court order, or a certification in writing. In each instance, the local service provider is to know the time period during which

assistance is required. 18 U.S.C. Section 2511(2)(a)(ii). Every reasonable requirement of Title III was ignored by GTE without any culpability.

The requirements denominated in Section 2511(2)(a)(ii) into Section 2520(a) reflects Congress's intent. It is controlling and these statutory requirements must be read together in order to correctly construe Title III. Without a proper interpretation of the statute, these protections will simply disappear. GTE and other telephone companies will enjoy the fruits of their illegal conduct with others with no concern for the rights of citizens. This is reinforced by Section 2520(d), which provides in pertinent part:

> (d) Defense.--A good faith reliance on--
> (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
> (2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or
> (3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;
> is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. Section 2520(d).

The Congressional intent in revising Section 2520 was clearly explained in both the House and Senate Reports on the ECPA of 1986. Representative Robert W. Kastenmeier, the Chairman of the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Committee on the Judiciary and one of the leading architects of the ECPA, reported and described on the differences between the Senate and House passed versions of the ECPA of 1986, which was accepted by the House to become Section 2520(a):

> A good faith defense is provided for those who comply with court orders or warrants, grand jury subpoenas, legislative or statutory authorizations, or a request of an investigative or law enforcement officer under section 2518(7) of title 18 concerning emergency situations. The term "good faith" is intended as an objective standard, which would include acting within the scope of a facially valid court order as received. Thus, under section 2520(a) of title 18, a civil action will not lie where the requirements of section 2511(2)(a)(ii) of title 18 are met. With regard to that exception, we intend that the following procedural standards will apply:
>
> First, the complaint must allege that a wire or electronic communications service provider--or one of its employees: (a) disclosed the existence of a wiretap; (b) acted without a

> facially valid court order or certification; (c) acted beyond the scope of a court order or certification or (d) acted in bad faith. Acting in bad faith would include ... collusion. .... [Emphasis Added]

132 Cong. Rec. H 8985, No. 134-Part II (Daily Ed. October 2, 1986). The Senate Report (Senate Report No. 99-541), while reciting much of the context of the need for the amendments, parallels this description:

> Proposed subsection 2520(a) of title 18 authorizes the commencement of a civil suit. There is one exception. A civil action will not lie where the requirements of section 2511(2)(a)(ii) of title 18 are met. With regard to that exception, the Committee intends that the following procedural standards will apply:
>
> (1) The complaint must allege that a wire or electronic communications service provider (or one of its employees): (a) disclosed the existence of a wiretap; (b) acted without a facially valid court order or certification; (c) acted beyond the scope of a court order or certification or (d) acted on bad faith. Acting in bad faith would include failing to read the order or collusion. .... [Emphasis Added].

S. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), Reprinted in 1986 U.S. Code Cong. & Ad. News 3555, 3580. By ignoring the mandate of Section 2511(2)(a)(ii), the legal standard is given a perverse twist requiring listening, or use,

by a telephone company. In the instant case, GTE concedes that there was no court order, no certification, or other lawful authorization of any sort authorizing the wiretaps in issue. See: James G. Carr, The Law of Electronic Surveillance (1996), § 8.3(a)(2).

This Court should not condone GTE and all telephone companies being given a pass for their knowing role in illegal wiretaps simply because GTE didn't listen. Co-Defendant Taff requested assistance and GTE, without hesitation or regard for the requirements of Section 2511(2)(a)(ii), agreed to provide and knowingly provided wiretap assistance without any court order or other written certification. Without GTE's collusion, Petitioners believe the wiretaps in the instant case may never have occurred. GTE's guilty knowledge, if nothing else, certainly negates any non-participation claim, it does not negate Title III.

In the instant case, GTE failed completely to monitor or even record the duration and scope of the wiretaps.[8] Petitioners lost all claims against GTE notwithstanding GTE

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[8] Even a valid court order authorizing a wiretap has a maximum duration of thirty (30) days unless judicially extended. 18 U.S.C. Section 2518(5). An emergency interception under Section 2518(7) has only a 48-hour duration before judicial approval of the interception must be sought.

"...provid[ing] information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications...." without written certification or court order directing such assistance. 18 U.S.C. Section 2511(2)(a)(ii). It must be emphasized that GTE acted **voluntarily**! GTE was not acting in response to a court "directive" under 2518) or any other legal compulsion. 18 U.S.C. Section 2518(4).

Following the logical extension of the trial court's opinion and order of July 12, 1996, Section 2511(2)(a)(ii) is reduced to surplusage. "The purposes of [Section 2511(2)(a)(ii)] and Title III as a whole would be subverted were the plain command of [this section] ignored...." *Cf. Gelbard*, 92 S.Ct. at 2362. The trial court's ruling additionally authorizes any telephone company to engage in cooperation based solely on oral requests from law enforcement officials [and potentially anyone else] to knowingly install illegal wiretaps and escape liability.

This precedent is an open invitation to abuse by telephone companies and local law enforcement. It approves a simple message to each telephone company, go ahead install, conceal just do not listen. A precedent with only the value to effectively repeal Section 2511(2)(a)(ii).

There is no decisional authority precisely on point due to the previously uniform opinion among telephone companies that cooperation cannot be furnished in instances where the telephone company engages in patently illegal conduct.

The prior decisions in *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), and related cases showed compliance with the written certification requirement. In *Smith*, the court dismissed the telephone service provider, the Chesapeake & Potomac Telephone Company ["C&P"], where the company, upon the receipt of a facially valid national security letter [a lawful written certification], provided limited assistance to the FBI. Unlike this case C&P had no knowledge the wiretaps would be used for an illegal purpose. GTE had no objective basis for believing that the requested wiretaps were legally authorized or otherwise legal.[9]

GTE can, under the current interpretation, knowingly provide technical capability and assistance to any law enforcement officer to accomplish unlawful interceptions — enabling law enforcement to engage in surreptitious, judicially unsupervised, unlawful wiretapping and recording -

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[9] A service provider's "good faith" is to be measured on an objective standard. 132 Cong. Rec. H 8985, No. 134-Part II (Daily Ed. October 2, 1986).

- so long as GTE employees do not personally perform the actual recording. This is contrary to Congressional intent.

Other cases like, *PBA, Local No. 38 v. Woodbridge Police Department*, 832 F.Supp. 808 (D.N.J. 1993), clearly envision a different role for the local service provider. In *PBA, Local No. 38*, the local law enforcement office bought standard recording equipment with standard installation from the service provider. The local service provider, New Jersey Bell, had no knowledge of the unlawful use which was made of the equipment at the hands of police supervisors. Such equipment is for limited use in the ordinary course of a customer's business in strict accordance with public tariff offerings and other legal requirements. The court noted that no evidence had been presented in *PBA, Local No. 38* by the plaintiffs which suggested any agreement between New Jersey Bell or its employees and anyone else involved in the interceptions. 832 F.Supp. at 832. In contrast, GTE willingly agreed to and knowingly participated in providing assistance to Defendant Taff. GTE, by its actions in making and maintaining the wiretaps, as supported by this record, **colluded** with Defendant Taff in engaging in the interceptions. This is clearly the type of engagement which Congress prohibited with the ECPA's amendments to Title III.

Even assuming *arguendo* Sections 2511(2)(a)(ii) and 2520 were ignored and emphasis was placed on whether GTE intercepted Petitioners' calls, liability should attach. Each protection built into the court order requirements of Section 2518(4), (5) and (7) becomes statutory surplusage if a local service provider can, with knowledge of the purpose of the request, install unlawful wiretaps upon an oral request with no civil liability or exposure, as long as it does not listen.

During the hearings on the ECPA of 1986, various telephone companies, including GTE and the Regional Bell Operating Companies entered appearances and/or written submissions supporting the proposed amendments to the statute. S. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), Reprinted in 1986 U.S. Code Cong. & Ad. News 3555, 3559-60. The comments and testimony of the companies uniformly recognized that any improper conduct or cooperation with local or other law enforcement officers, or other persons, would subject the companies to civil liability under Section 2520. Congress took the telephone companies' suggestions and tailored Section 2520(d) to broaden the protection accorded where employees could show objective "good faith" reliance on a facially valid court order or certification. Electronic Communications Privacy

Act: Hearings on H.R. 3378 before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. 108, 111, 132, 135, 292, 419, 420, 426, 431, 454, 517, 531, 532, 549, Serial No. 50 (1985-1986). None of these comments, concerns, or statutory defenses would be necessary were the statute intended only to reach conduct that required each local service provider to actually listen to an unlawful wiretap.

III. What Standard is to be Applied to Private Actors Like GTE in Determining Liability Under 42 U.S.C. Section 1983 Along with Public Officials

Although 42 U.S.C. Section 1983 applies to "state action", it is not limited to state or municipal corporations or their officials. This Court has left no doubt that a private entity can be held liable for a Section 1983 violation. *U.S. v. Price*, 383 U.S. 787, 86 S.Ct. 1152 (1966). The issue for review is to articulate for not only these parties, but all the lower courts, what standards should be applied construing *Price*. Here, GTE clearly acted to further the purposes of the Village of Minerva and its officials in violations of Petitioners Fourth Amendment rights. The trial court nonetheless held that GTE was not accountable under Section 1983.

As to all other defendants, the trial court found that Petitioners were deprived by Defendants of a federal Constitutional[10] right acting under color of law. Accord, *Cullen v. Margiotta*, 811 F.2d 698 (2nd Cir. 1987), *cert. denied* 107 S.Ct. 3266 (1987). The court held that both prongs of a Section 1983 violation were met. Appendix at A-39 and A-49. The trial court nonetheless held that GTE's conduct, "...does not rise to the level of willfully participating in a joint enterprise calculated to deprive plaintiffs of their constitutional rights." Appendix at A 56 - A 57. GTE willingly participated in an activity which was intended to deprive and in fact was found to deprive Petitioners of their statutory and Constitutionally protected Fourth and Fourteenth Amendment rights.

In *Price*, this Court set out alternative theories upon which a private person's culpability is measured under Section 1983. The court below stopped its inquiry and analysis at the "joint enterprise" level. *Price's* alternative or second test, whether the private actor is "jointly engaged with state officials in the prohibited action," *Price*, 383 U.S. at

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[10] The court below found that Defendants Village of Minerva, Taff and Harp had violated the Lewis's Fourth and Fourteenth Amendment guarantees.

794, is either no longer viable or simply superfluous *dicta*. The undisputed facts in the record of this case should leave no doubt that GTE "jointly engaged with state officials in the prohibited action."

At the time GTE first installed the initial two illegal wiretaps, it was fully aware that the announced purpose of the installations was to assist the local Police Chief in conducting warrantless surreptitious recording of the telephone conversations of individuals, including Petitioners. This Court has emphasized under the Fourth Amendment that searches conducted outside the judicial process are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347,357, 88 S.Ct. 507, 514 (1967). A writ will address the level of joint participation by the private entity along with the officials acting under the color of law for liability. GTE's knowledge that the wiretaps were sought and maintained without any court orders makes its voluntary decision to proceed reachable under Section 1983.

CONCLUSION

For these reasons, a writ of *certiorari* to review the judgment of the court below to properly protect citizens from illegal wiretapping under Title III and the responsibility of private actors who act with knowledge of the illegality of

those acting under color of law. Petitioners respectfully request that the Court grant this petition and issue a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

96-3959

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 28 1998

JERRY LEWIS and LORRAINE LEWIS,	)	
Plaintiff-Appellants,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	)	
VILLAGE OF MINERVA GTE NORTH, INC., et al.,	)	MEMORANDUM AND OPINION
Defendants-Appellees.	)	

BEFORE: KEITH, DAUGHTREY, and COLE, Circuit Judges.

PER CURIAM. Plaintiffs, Jerry Lewis and Lorraine Lewis, appeal from the order of the district court granting summary judgment to defendant GTE North, Inc.[1]

[1] Although plaintiffs originally filed suit against a host of defendants, only those claims involving GTE North, Inc. were on appeal before this Court.

After carefully considering the record on appeal, the briefs of both parties, and the applicable law, and having had the benefit of oral argument, we are not convinced that the district court erred in granting summary judgment to GTE North.

Because the reasoning that supports judgment for the defendant has been clearly articulated by the district court in a thorough and comprehensive opinion, the issuance of a detailed written opinion by this court would be unduly duplicative. Accordingly, the judgment of the district court is **AFFIRMED** upon the reasoning employed by that court in its Opinion and Order dated July 12, 1996.

FILED

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DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jerry L. Lewis, et al.,	)	
	)	
	)	
Plaintiffs,	)	CASE NO. 5:94-CV-2508
	)	
vs.	)	
	)	MEMORANDUM OPINION
Village of Minerva, et al.	)	(Resolving Docket Nos.
	)	61, 68, 69, and 91)
	)	
Defendants.	)	

I. INTRODUCTION

This case arises from the clandestine wiretapping of telephones and the recording of telephone conversations over a two-year period in the Village of Minerva, Ohio, allegedly targeted at the plaintiff, Jerry L. Lewis ("Lewis").

his wife, co-plaintiff Lorraine Lewis ("Mrs. Lewis"), have filed the instant complaint against the Village of Minerva, the Village of Minerva Police Department, village administrator David Harp, former village police chief Richard L. Taff and GTE North, Inc. In addition to the wiretap allegations, Lewis alleges he was subject to other job-related unconstitutional treatment which led to a temporary demotion and a lack of opportunity to advance. The complaint alleges that the acts and omissions of the defendants violate the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution, as well as federal and state wiretap laws.

The plaintiffs have moved for partial summary judgment (Docket No. 61). Moving for full summary judgment are Village of Minerva, Minerva Police Department and Harp (Docket No. 91); Taff (docket No. 69) and GTE North, Inc. (Docket No.68). For the reasons stated below, the motions of the plaintiffs, Taff, the village and Harp are granted in part and denied in part. The motion of GTE is

granted in full.

II. BACKGROUND FACTS

A. The Wiretaps

Although this case is overflowing with legal issues, the basic factual background is relatively undisputed. Taff was chief of police for the Village of Minerva ("the Village") from 1987 until his demotion to sergeant in March 1994. The police department is located in Minerva's administration building along with other administrative offices of the municipality. The police department used three of the six telephone lines coming into the building. Calls on those lines were recorded routinely and are not a part of this dispute. The Village's administrative offices used the building's other three telephone lines. Calls on those lines had not been subject to recording prior to 1992.

In early 1992, Taff suspected that Lewis, a sergeant on the police department, was informing a local bar of upcoming raids by agents of the Ohio Department of Liquor

Control. Taff suspected that when Lewis became aware of a raid, he would use one of the village's administrative lines to telephone the bar owner, avoiding use of the police lines because he knew they were recorded. In February 1992 Taff approached Harp, the Village administrator, for permission to place a wiretap[1] on the administrative lines. Harp asked Taff if the taping was legal. Taff responded that it was legal as long as one of the Village's lines remained untapped and one party to the conversation was aware of the wiretap. (Harp depo. at 13). Harp asked if Taff had consulted the Village's law director on the legality of the wiretap. Taff responded that he had checked with the prosecutor. Harp then consented to the wiretap for an unspecified period of time. He testified he assumed the

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[1] In the context of this case, the "wiretapping" is the attaching of the phone lines to a reel-to-reel recording device which automatically records the calls.

taping would last for "a weekend or so." (Id. at 14).[2]

Taff contacted John Williams, the local station manager of GTE North, Inc. ("GTE"). Taff informed Williams he suspected a police officer, whom he did not identify, was leaking confidential information to persons under investigation. He asked if GTE could attach two of the village's three administrative lines to a reel-to-reel tape recorder. Williams sent over the local GTE technician, Jerry Baxter, who made the connection Taff requested.[3] GTE had

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[2] Harp's account of his conversation with Taff is the only account before the Court. Taff, who apparently is the subject of an ongoing FBI investigation into the wiretap matters, exercised his Fifth Amendment privilege against self-incrimination when questioned about the conversation or any other aspect of the wiretapping. The plaintiffs do not dispute Harp's testimony.

[3] According to Baxter's deposition testimony, on his first visit to the station he informed Taff he could not make the connection without a piece of equipment referred to as a "punch-down tool." (Baxter depo. at 15). Several days later, Taff contacted Baxter and told him he had acquired the necessary tool. (Id. at 16). Baxter then returned to the police station and connected the two lines to the recording device. (Id. at 17).

no work orders or other written information regarding the job.

Approximately two weeks after authorizing the wiretap, Harp asked Taff whether the investigation was complete. According to Harp, Taff responded that he would like to "try one more time." (Harp depo. at 16).

In mid-April 1992, roughly two months after the authorization, Harp had a dispute with an executive of a local business over the details of a telephone conversation he had had with an employee of the business. Harp verified the details of the conversation by checking the tape. (Harp depo. at 21). Harp testified that the next day he told Taff, "If you're done with your investigation, you need to take it [the wiretap] off." (Id. at 22). Taff responded that he would take care of it. (Id.). Harp did not ask Taff about the wiretap again.

Taff did not remove the wiretap. Approximately one year later Taff contacted GTE to request a wiretap be

placed on the third telephone line to the administrative offices. Baxter, at the direction of this then-supervisor Charles Potter, completed the job. (Baxter depo. at 21). Harp did not know about or consent to the tapping of the third line. (Harp depo. at 30-31).

In January 1994 the mayor of Minerva, James Waller, inadvertently discovered that the administrative lines were being recorded. Upon investigation, Harp ordered Minerva Police Detective Robert First to have the taps removed immediately. (Harp depo. at 25-26). First contacted GTE, which disconnected the recording device from the administrative lines. (First depo. at 30-31).

Shortly before discovering that the administrative lines were still being recorded, Harp had suspended Taff on unrelated grounds.[4] While a decision on the level of

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[4] Among other alleged indiscretions, Taff had allowed his teenage daughter to drive a Village police car. When questioned about it, Taff denied he had given his daughter permission. However, a check of the police department tapes discovered a telephone call in which Taff had given

disciplinary action on Taff was pending, Taff's attorney met with Harp, Mayor Waller, and the village's attorney. According to Harp, Taff's attorney produced a hand-held micro cassette recorder and played a recording of a telephone conversation Harp had had with another city manager regarding Taff. (Harp depo. 92-98). Harp had neither been aware of nor authorized the recording of his telephone conversation.

B. Lewis' Employment-Related Claim

Lewis began with the Minerva Police Department ("MPD") in 1971 as an auxiliary officer. He began full-time employment with the MPD in 1981. He became a sergeant in 1985 or 1986. (Lewis depo. at 65).

Lewis alleges that starting in 1990, Taff began a

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permission. It was during the checking of the legitimately recorded police tapes that Village officials discovered that administrative lines were also being recorded. (Harp depo. at 24-26).

campaign to remove him from the police department. The record indicates that between 1990 and 1993 Lewis was the subject of several internal investigations, including three during calendar year 1992. The first 1992 investigation concerned Lewis' placement of a minor female in the residence of a local bar owner who later was convicted of corruption of a minor involving the girl. Taff ultimately cleared Lewis of wrongdoing. The second investigation involved a use of force on an arrestee. Taff found Lewis did not use excessive force but that he exercised poor judgment in allegedly boasting about hitting the arrestee. The final investigation involved Lewis' sleeping while guarding a federal prisoner in a local hospital. Taff issued a one-day suspension which was upheld by Harp on appeal.

In 1993 Taff authorized three more internal investigations of Lewis. The first two involved whether Lewis withheld information relating to criminal investigations from another police officer. The third involved allegations

that Lewis made derogatory and inappropriate remarks to a Minerva resident. In October 1993 Taff recommended to Harp that Lewis be demoted from sergeant to patrolman. Following a hearing at which Lewis' counsel was present, Harp accepted Taff's recommendation and demoted Lewis. Lewis appealed his demotion to the Stark County Court of Common Pleas. When the Village failed to timely respond to Lewis' appeal, Lewis was returned to the rank of sergeant and received back pay.

The Village operates under a charter as allowed by Article XVIII, Section 7 of the Ohio Constitution. The charter provisions supersede the civil service protection provisions afforded to police employees in non-charter governmental bodies. The charter gives the administrator the power to hire, fire and discipline all municipal employees, including police officers.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are

no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). See, e.g., U.S. v. Hodges X-Ray, Inc., 759 F.2d 557, 562 (6th Cir. 1985) and cases cited therein. The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of the responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). See Celotex corp. v. Catrett, 477 U.S. 317, 324 (1986).

Once the moving party satisfies his or her burden to show an absence of evidence to support the nonmoving party's case, Celotex Corp. v. Catrett, 477 U.S. at 323, the

party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Although the showing required of the nonmoving party by rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves...." Celotex Corp. v. Catrett, 477 U.S. at 324. General averments or conclusory allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Furthermore, unsworn statements and affidavits composed of hearsay and non-expert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." See Dole v. Elliott

Travel & Tours, Inc., 942 F.2d 962, 968-69 (6th Cir. 1991) (quoting State Mutual Life Assurance Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979) and citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17 (1970)). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts ... earlier deposition testimony." Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th cir. 1986) (citing Biechell v. Cedar Point, Inc., 747 F.2d 209, 215 (6th cir. 1984).

On a motion for summary judgment, the court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, 477 U.S. at 248. Non-material facts will not be considered. Neither will the judge attempt to weigh the material evidence or determine its truth. Anderson v. Liberty Lobby, 477 U.S. at 249. The judge's sole function will be to determine whether there is a genuine issue for trial

such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. (citations omitted).

Where the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," summary judgment is appropriate. Celotex corp. v. Catrett, 477 U.S. at 323 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. Anderson v. Liberty Lobby, 477 U.S. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam) and First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)). "'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" Street v. J.C.

Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

IV. CLAIMS OF THE PLAINTIFFS

Count One is a 42 U.S.C. § 1983 complaint, alleging that the defendants have violated Lewis' rights under the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution.[5] Defendants' alleged unlawful activity includes 1) subjecting Lewis to different terms and conditions of employment than other police employees; 2)

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[5] Most of Count One refers solely to Jerry Lewis as plaintiff. However, components regarding alleged invasion of privacy refer to Lewis and his wife as co-plaintiffs. See Complaint, ¶ 22.

retaliating against him for exercising constitutionally protected rights; 3) seizing his communications via the wiretaps; 4) denying him training opportunities; 5) placing him under surveillance without probably cause; and 6) demoting him and denying him assignments.

Count Two is based upon 18 U.S.C. § 2520, which affords a private cause of action for a person whose telephone communication is intercepted, disclosed, or intentionally used in violation of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("the wiretap act"). It alleges that during the two-year period that the Village administrative office's telephone lines were recorded, Lewis made numerous telephone calls to Mrs. Lewis, his attorney and others which were intercepted by the defendants.

Count Three is a state claim based upon Ohio's anti-wiretap statute, Ohio Rev. Code § 2933.51 et seq., which affords a private civil cause of action under § 2933.65.

Plaintiffs allege that the same conduct which constitutes a violation of the federal wiretap act also is a violation of state law.

An examination of the federal and state statutes reveals that they are functionally similar. The state statute appears to have been modeled in most respects after the federal wiretap act. This court has adopted the practice of declining to exercise supplemental jurisdiction over state claims when the state cause of action is based upon the same factual allegations and is merely parallel to a federal cause of action. The court is of the view that plaintiffs elected to proceed in the federal forum and that considering only the federal claims works no prejudice upon the plaintiffs.[6] Accordingly, the plaintiffs' claim that the defendants' activity constituted a violation of state law is dismissed without prejudice.

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[6] For example, the federal wiretap act affords the plaintiffs the full panoply of damages, including punitive damages and attorney fees if appropriate.

V. DISCUSSION

At the outset, the Court notes that the defendant Minerva Police Department is not a legal entity capable of suing and being sued. Edmunds v. Dillon, 485 F.Supp. 722, 724 (N.D. Ohio 1980). A lawsuit against the police department would properly be framed as a lawsuit against the local government entity, i.e., the Village. The plaintiffs have also named the Village in this suit, so the improper naming of the police department as a defendant has no legal significance. The Minerva Police Department is hereby dismissed as a defendant.[7]

Fairly read, the plaintiffs' complaint states causes of action based upon two interrelated sets of events: 1) Lewis' alleged unconstitutional treatment in his employment as a police officer, and 2) the alleged violations of the federal

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[7] The Court assumes the plaintiffs have realized the error of naming the police department as a defendant, as recent filings have made no reference to the police department as a defendant.

wiretap statute. The analysis will be divided along those lines.

A. The Employment-Related Claim (Count One)

Lewis asserts a Section 1983 claim against the Village, Harp and Taff for action related to his treatment as a police officer. He claims that in addition to being subject to an unlawful wiretap, he was denied training and advancement opportunities and was retaliated against for asserting constitutionally protected rights. He alleges that the acts of the defendants denied him of his rights under the First, Fourth, Ninth and Fourteenth Amendments of the Constitution. Upon close scrutiny, the Court finds that Lewis fails to raise a genuine issue of material fact to support his employment-related claim.

Lewis fails to offer evidence that anything the defendants did violated his First Amendment right to free speech. Accepting as true his contention that his communications were intercepted by the defendants, such

an interception did not infringe upon any First Amendment protected activity. See United States v. Bonfiglio, 713 F.2d 932, 938 (2d Cir. 1983) (police's playing of tape obtained without warrant did not constitute First Amendment violation).

While the Fourth Amendment claim may have merit as to a violation of the plaintiffs' expectation of privacy in telephone conversations, the Lewis fails to offer evidence that any Fourth Amendment violation affected any employment decision made by the defendants. In fact, the record bears no indication that the defendants obtained incriminating evidence as a result of the wiretaps. Lewis has thus failed to offer evidence establishing a link between an alleged Fourth Amendment violation and any employment-related injury.[8]

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[8] This conclusion in no way condones or ignores alleged constitutional violations committed by the defendants. The Court simply finds that the alleged violations fail to show constitutionally related damages in the context of the defendants' employment decisions.

Allegations of a Ninth Amendment violation merit little discussion. The Sixth Circuit has held that the Ninth Amendment "does not confer substantive rights in addition to those conferred by other portions of our governing law." Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991). The Court declines the plaintiffs' invitation to use this case to create an exception to this general rule.

Plaintiffs' Fourteenth Amendment claim is flawed in several respects. First, the claim is based upon a

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The Court finds the Fourth Amendment allegation misplaced in Count One. The privacy violation inherent in the alleged wiretapping is better stated as a part of Count Two, which is the statutory claim alleging a violation of the wiretap act. A Fourth Amendment claim based upon illegal wiretapping is virtually indistinguishable from a statutory claim of a wiretap violation. This is because the wiretap act was enacted to "conform [] to the constitutional standards set out in Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967)." S.Rep. No. 1097, 90th cong., 2d Sess. 2 (1986), reprinted in 1968 U.S. Code Cong. & Admin. News, 2112, 2113. Berger and Katz established that the Fourth Amendment extends to cover telephone communications. Thus although Count Two alleges a statutory cause of action, the statute incorporates Fourth Amendment protections and affords the plaintiffs the relief contemplated by Congress and the Constitution.

deprivation of Lewis' property interest in his employment with the Minerva Police Department. Whether a person has a property interest meriting constitutional protection is determined by looking to state law. See Board of Regents v. Roth, 408 U.S. 564, 577 (1982). In this case Lewis has no civil service protection. The Village of Minerva operates under a charter which places decisionmaking power in the hands of the administrator, who, "when he deems it necessary for the good of the service, [shall] suspend or remove or otherwise discipline all municipal employees." (Charter, Section 5.04). Rule 5 of the police department's rules and regulations empowers the administrator to suspend or remove officers "for any . . . reasonable and just cause *as determined exclusively by the Administrator*" (emphasis added). The rule further provides that "the actions of the Administrator shall be final except as otherwise provided by law."

Given the constraints of the charter, Lewis has not

provided evidence that he has a constitutionally protected interest in the first place. Cf. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-39 (1985) (civil service protection confers property right). However, even if he had established such an interest, he has failed to raise a material fact that the defendants deprived him of that interest in violation of the Fourteenth Amendment.

Procedural due process generally requires notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Prior to his demotion to patrolman, administrator Harp conducted a hearing at which Lewis and his counsel were present. After the demotion, Lewis filed an action in Common Pleas Court of Stark County, Ohio, had the demotion overturned and was awarded back pay. Thus it is clear he received procedural due process.

Lewis' claim does not state a substantive due process violation. The Sixth Circuit has made clear that

issues related to termination of or failure to promote a public employee do not raise to the level of "fundamental" interests, "implicit in the concept of ordered liberty," protected by substantive due process. Sutton v. Cleveland Bd. Of Educ., 958 F.2d 1339, 1350-51 (6th Cir. 1992) (quoting Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) (citations omitted)).

Lewis' equal protection claim is likewise deficient. Lewis makes no allegation he was treated differently from other police employees because of some suspect classification, which is essential to an equal protection claim. A mere assertion that a party was treated more poorly than others "has never been thought to raise an equal protection claim." Wagner v. Higgins, 754 F.2d 186, 194 (6th Cir. 1985) (Contie, J., concurring). The fallacy of an equal protection argument under the facts as set forth by Lewis is illustrated in Booher v. U.S. Postal Service, 843 F.2d 943, 944 (6th Cir. 1988):

> [Plaintiff] seeks to make out a violation of equal protection by claiming he was treated differently from other similarly situated employees. Fatal to this allegation is the fact that there is no claim that [plaintiff] was victimized because of some suspect classification, which is an essential element of an equal protection claim. Even assuming there was an unjustified action taken against [plaintiff,] this single action, without more, cannot form the basis of an equal protection claim. We have previously delineated the difference between a constitutional injury and a common tort action by requiring a showing of suspect classification of a *group*: "the equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class receiving better treatment than a plaintiff who alleges tortious injury." Joyce v. Mavromatis, 783 F.2d 56, 57 (6th Cir. 1986). [Plaintiff's] equal protection claim must accordingly fail.
>
> Id. (Emphasis added).

In summary, the plaintiffs' Section 1983 claim fails to raise a genuine issue of material fact. Summary judgment is therefore appropriate on Count One.

B. The Wiretap Claim (Count Two)

At issue on the wiretap claim are cross-motions for summary judgment. Motions have been filed by the

plaintiffs (Docket No. 61), defendant GTE North (Docket No. 68), defendant Taff (Docket No. 69), and defendants Village of Minerva and Harp (Docket No. 91). For reasons that follow, the court 1) grants the plaintiffs' motion with respect to all defendants other than GTE, 2) denies the plaintiffs' motion with respect to GTE, 3) grants GTE's motion, and 4) denies the motions of the remaining defendants.

The federal anti-wiretap statute, 18 U.S.C. § 2510 et seq., provides for civil damages against those who violate its provisions. Section 2520 provides in relevant part:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

To recover, plaintiffs must show that the defendants violated Section 2511, which prohibits the interception, disclosure or use of any wire, oral or electronic communication. A person or entity violates Section 2511 by

doing any of the following without following procedures

established elsewhere in the statute:

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .

Lewis focuses on part (a) of the above-quoted provision, alleging that over a two-year period the defendants intercepted conversations with Mrs. Lewis, his

attorney and others in violation of the statute. "Intercept" is defined in the statute as the "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

The Village, Harp and Taff offer a host of defenses,[9] starting with the assertion that the plaintiffs have no evidence that their calls were in fact "intercepted." They argue that the word "aural" in the definition of "interception" implies that someone actually must have listened to the conversation in order for there to be an "interception." Although conceding that the calls were taped, defendants claim plaintiffs have provided no evidence that anyone listened to their calls. They offer several cases supporting the proposition that conversations which were recorded but not listened to were not "intercepted."

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[9] GTE's defense will be considered separately following this discussion.

Defendants ignore the fact that the plaintiffs' discovery was hindered by a major stumbling block: defendant Taff exercised his Fifth Amendment right against self-incrimination rather than answer any questions regarding his role in the wiretapping. Importantly, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

Harp's uncontroverted deposition testimony, supported in key areas by the testimony of GTE employees, offers the following chain of events: Taff told Harp he wanted to tap administrative lines in order to determine whether Lewis was tipping off bar owners on liquor investigations. Harp gave permission for the recording. GTE attached the lines to the recorder. Harp later asked Taff if he got what he needed. Taff said he needed to try it "one more time." Taff later instructed GTE to tap the Village

administrative office's final unrecorded line. Taff's counsel later produced for Harp a recording of a tape of Harp's conversation with another village administrator.[10]

Under these facts and the inferences therefrom, the defendants' claim that the plaintiffs have failed to prove that their conversations were "intercepted" because there is no evidence that they were listened to is unavailing.

Defendants next argue that even if Taff listened to the tapes, there is no evidence of an intentional violation of the statute. However, defendants misconstrue the meaning of the "intentional" state of mind in the law. Defendants argue that plaintiffs must prove that the defendants, by placing the wiretaps, intended to violate the federal wiretap act. Such a conclusion is belied by the statute's plain language. Section 2511(1)(a) imposes liability upon any person who "intentionally intercepts . . . any wire, oral or

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[10] The latter fact, while not directly involving telephone calls of the plaintiffs, is evidence that Taff in fact was monitoring the calls he recorded.

electronic communication." It makes no reference to knowledge of statutory violation. In contrast, Section 2511(1)(d) imposes liability upon any person who "intentionally uses . . . the contents of any wire, oral, or electronic communication, *knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection*" (emphasis added). The contrast between the two provisions is unmistakable: although liability for *use* of a communication may be premised upon knowing or having to reason to know it was unlawfully obtained, liability for *interception* of a communication has no such predicate. In short, the "intent" required to establish a violation of §2511(1)(a) is merely the intent to achieve the result and not the intent to break the law. See Earley v. Smoot, 846 F.Supp. 451, 453 (D.Md. 1994) ("[L]iability may be imposed under §2511(1)(a) merely for intentional - in the traditional sense of purposeful - conduct, without showing of

disregard of a known legal duty").[11]

The defendants next argue that the wiretap act's "ordinary course of business" exemption applies. Section 2510(5) of the statute exempts from liability an interception on "any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic

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[11] The Court finds defendant Taff's citation to Boddie v. American Broadcasting Companies, Inc., 731 F.2d 333, 338 (6th Cir. 1984), which imposed a requirement that defendants intended an illegal purpose, unpersuasive for two reasons. First the *mens rea* in the statute at the time was "willful" rather than "intentional." Second, when amending the statute to create the "intentional" *mens rea* in 1986, Congress underscored that its purpose was to ensure that a party would not be liable for "inadvertent interceptions" of communications. S. Rep. No. 541, 99th Cong., 2d Sess. 23 (1986), reprinted in U.S. Code cong. & Admin. News, 3555, 3577. This does not support a conclusion Congress meant to require that a party intend to break the law to be held liable.

Nor is Taff's citation to Wuliger v. United States, 981 F.2d 1497 (6th cir. 1992), cert. denied, 114 S.Ct. 1293 (1994), persuasive. Wuliger concerned a conviction under §2511(1)(d) which, as discussed above, does require that the party be aware of the legal violation. It thus does not contribute to analysis of the *mens rea* required in a §2511(1)(a) violation.

communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business." Thus to fit into the exemption, the interception 1) must occur through use of equipment furnished by a communications provider, and 2) be used in the ordinary course of business. The defendants argue that 1) the connection to the recorder was provided by GTE, and 2) Taff's attempt to catch Lewis making incriminating statements on the telephone was in the ordinary course of police business, i.e., a criminal investigation.

This circuit has pointed out that the "ordinary course of business" exemption is narrowly construed. U.S. v. Murdock, 63 F.3d 1391 (6th Cir. 1995), cert. denied, 116 S.Ct. 1672 (1996), cited numerous cases applying the exemption narrowly[12] before concluding that "the

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[12] For example, Briggs v. American Air Filter Co., Inc., 630 F.2d 414 (5th Cir. 1980), narrowly defines the circumstances under which an employer can listen in on an employee's conversation:

indiscriminate recording of both incoming and outgoing calls . . . does not constitute conduct within the ordinary course of . . . business" under the facts of that case. Id. at 1397.[13]

Murdock held that legislative history of the wiretap statute

> [W]hen an employee's supervisor has particular suspicions about confidential information being disclosed . . ., has warned the employee not to disclose the information, has reason to believe that the employee is continuing to disclose the information and knows that a particular phone call is to an agent of the competitor, it is within the ordinary course of business to listen in on an extension phone for at least as long as the call involves the type of information the supervisor fears is being disclosed.

Id. at 420. Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983) held that personal calls may not be intercepted in the ordinary course of business except to the extent necessary to guard against unauthorized use of the telephone or to determine whether or not a call is personal.

[13] In Murdock, the defendant's wife was co-owner of a funeral parlor business. She captured his telephone conversations at the funeral home over a three-month period via a recorder attached to a business extension phone located in the couple's home. She stated that her purpose was to check on her husband's business dealings as well as to check on his possible marital infidelities. Id. at 1396.

"inescapably lead[s] to the conclusion that 18 U.S.C. § 2511(1)(a) establishes a broad prohibition on all private electronic surveillance." Id. at 1398.

Tapping telephone lines may or may not be within the ordinary course of a police department's business. Tapping telephone lines *without a warrant* and in order to achieve "the indiscriminate recording of both incoming and outgoing calls," Murdock, supra, clearly is not within the ordinary course of police business. Such conduct was precisely what the wiretap act was intended to avoid. Section 2516 of the statute provides precise steps that government officials must take, including obtaining a warrant, before implementing wiretaps. These steps are necessary to ensure that parties are not subject to unconstitutional searches. The plaintiffs did not leave their constitutional and statutory rights at the door of the Village administration building.

In sum, from the uncontroverted facts it is clear that

the defendants cannot rely on the statute's ordinary course of business exception.

The defendants also attempt to invoke the statute's consent exception to avoid liability. Section 2511(2)(c) states, "It shall not be unlawful . . . for a person acting under color of law to intercept a . . . communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." The obvious flaw in the defendants' reasoning is that no party to the conversations in issue consented to the taping.[14]

Taff seeks refuge in the exception provided in Section 2511(2)(d) which allows recording by persons *not* acting under color of law so long as one party consents to the interception and the communication is not intercepted for

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[14] Although it is not clear from the briefs, the defendants apparently argue that the knowledge of Taff and/or Harp of the taping constitutes constructive consent for the Village. Neither logic nor case law supports such a proposition.

the purpose of committing any criminal or tortious act. Reliance on this exception is misplaced for two obvious reasons: 1) Taff, as chief of police, was acting under color of law, and 2) no party consented to the interception.

Finally, the defendants offer two other theories meriting extended analysis. The Village argues that it should not be liable for the acts of its employees. Harp and Taff argue that the doctrine of qualified immunity should insulate them from personal liability. The arguments will be taken in turn.

1. Municipal Liability[15]

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[15] Plaintiffs' complaint creates an unusual situation in which the Village is sued both directly and under 42 U.S.C. § 1983. In Count One, the plaintiffs allege that the Village is liable under Section 1983 for the unconstitutional acts of its policymakers, including alleged Fourth Amendment violations related to the wiretapping. In Count Two, the plaintiffs allege that the Village is liable under the federal wiretap statute. The parties focus their briefs on whether the Village can be held liable under a Section 1983 ("Monell") theory of liability. The Court is of the view that the Village can be held liable in *respondeat superior* for the

When a Section 1983 claims is made against a municipality, two distinct issues must be analyzed: 1) whether the plaintiff's harm was caused by a constitutional or statutory violation; and 2) if so, whether the city is responsible for that violation. Collins v. City of Harker Heights, Tex., 503 U.S. 115, 120 (1992); Maine v. Thiboutot, 448 U.S. 1, 4 (1980). In this case the plaintiffs have presented evidence that the alleged harm was a result of a violation of their statutory and Fourth Amendment rights, satisfying the first prong of the test.

As for the second inquiry, municipalities and other

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statutory, as opposed to the constitutional, violations of its employees, i.e., the allegations of Count Two, without the need to engage in a Monell-type analysis. Nonetheless, the Court frames its analysis under Monell, in part because of the subsuming of the Fourth Amendment issue into Count Two and in part to illustrate that the Village can be held liable even under Monell's heightened standard.

The Court is aware that municipalities are not liable for punitive damages under Section 1983. The Court by separate order will direct the parties to brief the issue of whether the Village can be liable for punitive damages for the statutory violation of
Count Two.

governmental entities are not responsible for constitutional and statutory deprivations unless there is a direct causal link between a municipal policy and the alleged deprivation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978); Deaton v. Montgomery County, Ohio, 989 F.2d 885, 889 (6th Cir. 1993). In other words, the plaintiff must "identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." Garner v. Memphis Police Dep't, 8 F.3d 358, 363-64 (6th Cir. 1993) (quoting Coogan v. Wixom, 820 F.2d 170, 176 (6th Cir. 1987)), cert. denied, 114 S.Ct. 1219 (1994). Therefore, a local government is not liable solely because it employed a tortfeasor. Monell, 436 U.S. at 691; Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994). "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an

entity is responsible." Monell, 436 U.S. at 694; Meyers v. City of Cincinnati, 14 F.3d 1115, 1117 (6th Cir. 1994).

"Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985). The policy may be established by a single decision-maker if that person possesses final authority under state law to establish municipal policy with respect to the action ordered. See City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) ("Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.")

The Village argues that it cannot be liable under a Section 1983 analysis for the acts of Taff or Harp.

Evaluating the potential liability of the Village requires an inquiry into where the Village, pursuant to state law, has placed final decisionmaking authority in police matters. See Praprotnik and Pembaur, supra.

Pursuant to Article XVIII, Section 7 of the Ohio Constitution, the Village has adopted a charter under which it exercises all powers of local self-government. The charter is thus critical in determining what person or body bears final decisionmaking authority for matters related to the alleged unconstitutional activity. Section 5.04 of the Village Charter empowers the Village Administrator (Harp) as "Chief Executive, Administrative and Law Enforcement Officer of the Municipality." As the following language indicates, the Charter places substantial administrative authority in the administrator:

> [The Administrator] shall be responsible to the Council for the administration of all municipal affairs placed in his charge by or under this Charter, the ordinances of the Municipality and State laws. He shall have the following powers and duties:

> a. He shall appoint and, when he deems it necessary for the good of the service, suspend or remove or otherwise discipline all municipal employees and appointive administrative officers, except as [otherwise provided]. He may authorize any administrative officer who his subject to his direction and supervision to exercise these powers with respect to subordinates in that officer's department, office or agency. . . .
>
> b. He shall direct and supervise the administration of all department, offices and agencies of the Municipality, except as otherwise provided by this Charter.

Section 5.05 of the Charter, title "Council - Administrator Relations," reflects further the extent of authority conferred to the administrator:

> Neither the Council nor any of its members shall in any manner dictate the appointment or removal of any administrative officers or employees whom the Administrator or any of his subordinates are empowered to appoint, .

> . . Except for the purpose of inquiries and investigations, the Council or its members shall deal with officers and employees who are subject to the direction and supervision of the Administrator solely through the Administrator, and neither the Council nor its members shall give orders to any such officer or employee, either publicly or privately, . . .

Section 6.07 of the Charter establishes the administrator as head of the Department of Public Safety and empowers the administrator to "direct and supervise the work, administration and service provided by all divisions" of the Department of Public Safety, including the police department.

The Charter thus makes clear that Harp, as administrator, is the final decisionmaker with respect to matters involving the police department. He needs no concurrence from the Village Council or any other body. As final decisionmaker, the decisions of Harp are the policy of the Village and can bind the Village under Section 1983.

This conclusion is supported by the Sixth Circuit's analysis in Meyers v. City of Cincinnati, 14 F.3d 1115 (6th

Cir. 1994). In Meyers, a firefighter filed a Section 1983 action for being terminated on the basis of making statements protected by the First Amendment. The Sixth Circuit engaged in an analysis which is particularly appropriate to the facts of this case:

> The requirement that a municipality's wrongful actions be a "policy" is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. It is meant to distinguish those injuries for which "the government as an entity is responsible under § 1983," Monell, 436 U.S. at 694, from those injuries from which the government should not be held accountable. . . .
>
> The City of Cincinnati's argument is that even if it did violate Meyers' First Amendment rights, it did not do so pursuant to a general rule disfavoring free speech. In Pembaur [v. City of Cincinnati, 475 U.S. 469 (1986)], the Supreme Court addressed and rejected the same argument, holding that "it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances." Id. at 480. The City's contention that Meyers' constructive discharge was an isolated incident does not, therefore, save the city from liability. If the decision to punish him for exercising his constitutional rights was made by the

> government's authorized decisionmakers the City is responsible.

Meyers, 14 F.3d at 1117-18 (quotation omitted). The decision to approve the illegal wiretap in the instant case was made by Harp, who by virtue of the broad powers conferred in the Charter was the municipality's authorized decisionmaker. Under the analysis of Meyers and Pembaur,[16] the decision represents the

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[16] Pembaur also provided language which is relevant to the facts of this case:

> The fact that a particular official – even a policy-making official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result,

policy of the Village.

Deposition testimony bears out the fact that Harp was the final decisionmaker on police matters. Harp testified that in his years as administrator, he could recall no police policy matters being taken to the Village council. (Harp depo. at 90).

In sum, given Harp's position as the village's authorized decisionmaker, his decision to allow the wiretap is considered the decision of the Village for purposes of the instant action.

2. Qualified Immunity

> particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is [not an] an application of the theory of *respondeat superior*.
>
> Pembaur, 475 U.S. at 483.

Harp and Taff could be protected from liability for damages if their alleged wrongful conduct was committed while they performed a function protected by qualified immunity. See Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988).

Officials who perform discretionary functions are generally entitled to qualified immunity from individual liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Christophel v. Kukulinsky, 61 F.3d 479, 484 (6th Cir. 1995). The question of whether an official is protected by qualified immunity does not turn on the subjective good faith of the defendant, but rather turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time of the alleged wrongdoing. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982); Mackey v. Dyke, 29 F.3d 1086, 1094 (6th

Cir. 1994).

The uncontroverted facts of this case establish that Taff, with the authorization of Harp, installed a recording device without a warrant in violation of the federal wiretap statute. The statute has been the law of the land since 1968, leaving no doubt that the right to be free from warrantless wiretaps was clearly established at the time of the violation.[17]

The question thus becomes whether a reasonable person in the position of Taff and Harp would have understood that the conduct violated the rights of the plaintiffs. The subjective good faith of Harp and Taff is not relevant to this inquiry; the focus is on objective reasonableness.

The Court finds that a reasonable police chief would

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[17] In addition to the clear statutory provisions, the 1967 Supreme Court decisions in Berger and Katz, supra note 14, reflect a clear pronouncement that oral communications are protected by the Fourth Amendment.

know that instituting a warrantless wiretap and maintaining it for two years is illegal. Taff is thus not afforded the defense of qualified immunity.

The question whether a reasonable village administrator would be aware that the wiretap would violate the rights of the plaintiffs is more difficult. The administrator is not a police officer trained in the vagaries of the Fourth Amendment. However, under the Minerva charter Harp is the director of public safety and the person to whom the police chief reports.

Several factors inform the Court's decision that Harp should not escape individual liability based upon an objective reasonableness standard. The Court acknowledges that a reasonable village administrator might not know specifically, at the moment he is approached by the police chief, that warrantless wiretapping is illegal. However, a reasonable administrator would know, at the very least, that a warrantless wiretap was of dubious legality

and would take reasonable steps to satisfy himself that the constitutional rights of the Village's employees were not violated. An examination of Harp's actions indicate he did not satisfy this requirement.

Harp testified Taff told him the wiretapping was legal so long as one line remained free and "as long as one party to the conversation was aware of it." (Harp depo. at 13). Harp should have pressed further because it was obvious that under the circumstances described by Taff that no party to the conversation would be aware of the recording. Harp then asked if Taff had consulted the law director. Taff said he had talked to the prosecutor but did not name which prosecutor. Harp conceded he made no effort to determine which prosecutor Taff had consulted.[18] Even after

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[18] Harp testified in a separate deposition, taken in another case but submitted as a part of this case's record, that the Village, stationed on the border of three counties has contact with several county and municipal prosecutors. (Harp depo. in Holland et al. v. Village of Minerva, Docket No. 65, at 53).

discovering the wiretap was in place long after he expected it to be concluded, Harp merely instructed Taff to remove it. He did not follow up. Because a reasonable village administrator would have known or taken steps to discover that the wiretap was a violation of clearly established law, the Court finds that Harp cannot be afforded the protection of qualified immunity.[19]

In conclusion, qualified immunity protects neither Harp nor Taff. Summary judgment is thus denied to Harp,

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[19] This conclusion is supported by the Supreme Court's strict application of the "reasonable public official" standard:

> If the law was clearly established, the immunity defense normally should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the defense should be sustained.

Harlow, 457 U.S. at 818-19. Harp has failed to show the "extraordinary circumstances" entitling him to the qualified immunity defense, in light of the clearly established law.

Taff and the Village.

C. GTE's Motion for Summary Judgment

The precise wording of the section of the wiretap statute permitting civil actions is critical in an analysis of potential liability for GTE. It is written as follows:

> **§2520. Recovery of civil damages authorized**
>
> **(a) In general.** - . . . [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover *from the person or entity which engaged in that violation* such relief as may be appropriate.

(Emphasis added). Thus the statute's plain language allows recovery only from a party which intercepts, discloses or intentionally uses a plaintiff's communication. There is no allegation that GTE "disclosed" or "used" the plaintiffs' communication. Plaintiffs argue that by virtue of assisting in attaching the recording device, GTE should be liable for "intercepting" the communications. However, this argument

is contrary to the plain language of the statute.

As noted previously, the statute defines "intercept" as the "aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other devise." 18 U.S.C. § 2510(4). GTE's involvement began and ended with the connection of the lines to the recording device. No rational jury could find that GTE's role in this controversy can be characterized as an "interception" of the telephone calls of the plaintiffs.

Such a conclusion is not without precedent. In PBA Local No. 38 v. Woodbridge Police Dept., 832 F.Supp. 808 (D.N.J. 1993), on similar facts involving a police chief's monitoring of communications without notice to employees, the court noted, "All [the telephone company] did was install, and perhaps maintain or service, a 'call director' in the [police chief's] office. This does not amount to 'interception.'" Id. at 832.

Plaintiffs cite no authority to support their proposition that GTE's conduct constituted an "interception." Whether the conduct of GTE's employees might have subjected the company to criminal liability is not before this court. The issue is GTE's liability under Section 2520, and plaintiffs have failed to raise a genuine issue of material fact that GTE intercepted their communications. Summary judgment is thus appropriate on the claim against GTE based upon its alleged violation of 18 U.S.C. § 2520.

The plaintiffs have no more success in their Section 1983 claim against GTE. Section 1983 actions generally only can be asserted against state actors. However, the Supreme Court has held, "[T]o act 'under color of' state law for § 1983 purposes does not require that he defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents." Dennis v. Sparks, 449 U.S. 24, 27 (1980).

As stated previously, GTE's role in this controversy

was limited to installing a device through which the telephone calls could be recorded. The installation was at the Village's administration building and at the request of the Village's chief law enforcement officer. Construing the inferences in favor of the plaintiffs, such action does not arise to the level of willfully participating in a joint enterprise calculated to deprive the plaintiffs of their constitutional rights. Summary judgment is granted to GTE on the Section 1983 claim.

D. Plaintiffs' Motion for Summary Judgment

Having denied the summary judgment motions of the Village, Harp and Taff as to Count Two of the complaint, and finding no material facts in dispute, the Court finds it appropriate to grant the plaintiffs' motion for summary judgment on Count Two against the above named defendants.[20]

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[20] Because GTE North's activity did not constitute an interception, the plaintiffs' summary judgment motion is denied with respect to GTE.

The Court already has discussed at length the federal wiretap statute. As relevant here, Section 2511(1)(a) prohibits the interception of any wire, oral or electronic communication, with exceptions shown not to be applicable to the facts of this case. Section 2520(a) allows a party whose wire, oral or electronic communication is intercepted in violation of the statute to recover from the person or entity which engaged in that violation.

The Court rejects the defendants' contention that the plaintiffs have failed to provide evidence that their conversations were listened to. Although there was no direct testimony to that effect, the circumstantial evidence is overwhelming. The intent of the wiretap was to catch Lewis making incriminating remarks on the telephone. Harp received permission to tap two previously unrecorded phone lines for that express purpose. Later he told Harp he wanted to try it "one more time," an indication that he had tried previously.

Although Taff exercised his Fifth Amendment privilege and refused to answer questions regarding his involvement in the wiretapping, at least two additional events lend weight to the conclusion that he listened to the plaintiffs' telephone conversations. First, one year after the original taps were placed, he induced GTE to tap the third and final Village administrative line – a clear indication of his continued interest in the wiretap project. Second, after his suspension his attorney presented Harp with a taped conversation of a conversation Harp recently had had with another village administrator – another indication Taff was continuing to monitor calls.

No reasonable jury could examine the totality of this evidence and reach any other conclusion than a finding that Taff listened to – intercepted – the conversations of the plaintiffs. Summary judgment is thus granted to the plaintiffs against the Village, Harp and Taff on the issue of liability. Trial will be restricted to the issue of damages.

VI. CONCLUSION

For the reasons set forth above, the Court resolves the summary judgment motions as follows:

The motion of the Village of Minerva and Harp (Docket No. 91) is granted as to Count One (the employment claim) and denied as to Count Two (the wiretap claim), with the caveat that the Court considers the Fourth Amendment aspect of Count One to be incorporated into the statutory allegations of Count Two.

The motion of Taff (Docket No. 69) is granted as to Count One (the employment claim) and denied as to Count Two (the wiretap claim), with the same caveat as in the preceding paragraph.

The motion of GTE North, Inc. (Docket No. 68) is granted in all respects.

The motion of the plaintiffs (Docket No. 61) is granted as to Count Two against all parties other than GTE North, inc.

The Court declines to exercise its supplemental jurisdiction as to Count Three and dismisses the claim without prejudice.

The Court will publish a judgment entry contemporaneously with the publication of this opinion and will schedule a status conference by separate order to discuss proceeding to trial on the remaining issue, i.e., damages with respect to Count Two.

IT IS SO ORDERED.

/S/
David D. Dowd, Jr.
U.S. District Judge

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DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jerry L. Lewis, et al.,)
)
)
Plaintiffs,) CASE NO. 5:94-CV-2508
)
vs.)
) JUDGMENT ENTRY
Village of Minerva, et al.)
)
Defendants.)

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

The motion for summary judgment of the Village of Minerva and Harp (Docket No. 91) is granted as to Count

One (the employment claim) and denied as to Count Two (the wiretap claim), with the caveat that the Court considers the Fourth Amendment aspect of Count One to be incorporated into the statutory allegations of Count Two.

The motion of Taff (Docket No. 69) is granted as to Count One (the employment claim) and denied as to Count Two (the wiretap claim), with the same caveat as in the preceding paragraph.

The motion of GTE North, Inc. (Docket No. 68) is granted in all respects.

The motion of the plaintiffs (Docket No. 61) is granted as to Count Two against all parties other than GTE North, inc.

The Court declines to exercise its supplemental jurisdiction as to Count Three and dismisses the claim without prejudice. IT IS SO ORDERED.

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David D. Dowd, Jr.
U.S. District Judge

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DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jerry L. Lewis, et al.,)
)
Plaintiffs,) CASE NO. 5:94-CV-2508
)
vs.)
) MEMORANDUM OPINION
Village of Minerva, et al.)
)
Defendants.)

By Order dated and filed July 12, 1996 this Court granted defendant GTE North's motion for summary judgment (Docket No. 68) and denied plaintiffs' motion for partial summary judgment against defendant GTE North, Inc. ("GTE North") (Docket No. 61). As to defendants Richard Taff, David Harp and Village of Minerva, plaintiffs'

motion for partial summary judgment was granted with respect to liability under the federal wiretap statute; the issue of damages remains to be tried. Because a decision is not "final" within the meaning of 28 U.S.C. Sec. 1291 where the awarding of relief remains to be resolved, Williams v. Commonwealth of Ky., 24 F.3d 1526, 1542 (6th Cir.), cert. denied, __ U.S. __, 115 S.Ct. 358 (1994), the July 12 judgment entry adjudicates fewer than all claims or the rights and liabilities of fewer than all parties and therefore does not enter judgment so as to terminate this civil action as to GTE North. However, in all other respects the July 12th order is final as to GTE North.

The plaintiffs have moved this Court for an order for entry of a final judgment pursuant to Fed. R. Civ. P. 54(b) as to this Court's granting of defendant GTE North's motion. By utilizing Rule 54(b), this court "may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less

than all, claims . . . ," Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437, 76 S.Ct. 895, 900 (1956), or for fewer than all the parties.

Before a Rule 54(b) certification can be made the Court must consider several factors. Corrosioneering, Inc. v. Thyssen Environmental Systems, Inc., 807 F.2d 1279, 1283 (6th Cir. 1986). This Court will consider these factors in order.

(1) Relationship Between the Adjudicated and Unadjudicated Claims.

The issue of whether defendant GTE North's conduct vis-a-vis plaintiffs creates any liability on the part of this defendant is a separate and distinct legal issue from other issues in the case. Thus, it is logical that it be appealed, if at all, in a separate action.

(2) Whether or not the need for review might or might not be mooted by future developments in the district court.

Plaintiffs moved this Court to vacate in part or alter and amend its ruling of July 12, 1996 as to GTE North

(Docket No. 124). Plaintiffs' motion to vacate in part or alter and amend is not well taken, and has been denied. Thus, there are no developments which this Court believes will moot the need for appellate review.

(3) Whether the reviewing court might be obliged to consider the same issue a second time.

Because the liability issues with respect to GTE North and the other defendants are separate and distinct, there is no possibility that the circuit court might be obligated to consider the same issue a second time related to the other defendants. GTE North's conduct and legal obligations are governed by tariffs, exceptions, and statutory provisions different from those applicable to the local law enforcement and municipal defendants.

(4) The presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final.

The Court determined that defendants Taff, Harp and Minerva are liable to plaintiffs in damages pursuant to Section 2520 of Title III, as amended, 18 U.S.C. Section

2520. The issue of damages will be determined at trial. There are no claims or counterclaims which could result in a set-off against the judgment sought to be made final.

(5) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

The claims which plaintiffs have raised against GTE North are real and substantial and the defenses posited by GTE North are well grounded. Thus, there are no issues involved in this putative appeal which are frivolous.

In their Rule 54(b) motion, plaintiffs indicated that (1) they wish to try all damage claims, including those against GTE North, in a single action; and (2) they would seek an expedited appeal in the circuit. This Court finds that consolidation of all damage claims into a single trial will further the interests of judicial economy.

This Court has reviewed its Memorandum Opinion and Order of July 12, 1996 and weighed and examined the competing factors involved in the certificate of its decision as

to GTE North. Based upon said review, the Court has determined that there is no just reason for delay. In reaching this conclusion, this Court has ". . . take[n] into account judicial administrative interests as well as the equities involved." Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8 (quoting Mackey, 351 U.S. at 438).

Accordingly, plaintiffs' motion for a declaration pursuant to Rule 54(b) is hereby GRANTED and the plaintiffs are given leave to appeal the July 12, 1996 ruling as to GTE North to the United States Court of Appeals for the Sixth Circuit.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

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DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jerry L. Lewis, et al.,	)	
	)	
	)	
Plaintiffs,	)	CASE NO. 5:94-CV-2508
	)	
vs.	)	
	)	ORDER
Village of Minerva, et al.	)	(Resolving Docket No. 124)
	)	
Defendants.	)	

Plaintiffs have moved, pursuant to Fed. R. Civ. P. 59(e), to vacate in part or alter and amend the court's judgment of July 12, 1996. They ask the Court to reconsider the part of its decision granting defendant GTE North's motion for summary judgment. The Court has considered plaintiffs' argument and maintains its view that GTE North's motion for summary judgment was meritorious.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

934 F.Supp. 268, Lewis v. Village of Minerva, (N.D.Ohio 1996)

***268** 934 F.Supp. 268

Jerry L. LEWIS, et al., Plaintiffs,
v.
VILLAGE OF MINERVA, et al., Defendants.

No. 5:94 CV 2508.
United States District Court,
N.D. Ohio,
Eastern Division.

Aug. 26, 1996.

In action against village for allegedly intercepting plaintiffs' telephone communications in violation of federal wiretap statute, the District Court, Dowd, J., held that municipalities cannot be held liable for punitive damages for violations of federal wiretap statute.

So ordered.

1. CIVIL RIGHTS k275(2)
78 ----
78II Federal Remedies
78II(B) Civil Actions
78II(B)3 Judgment and Relief
78k269 Damages
78k275 Exemplary or Punitive Damages
78k275(2) Government liability.

N.D.Ohio 1996.

Although municipalities may be directly liable for monetary, declaratory, and injunctive relief under s 1983, such liability does not extend to liability for punitive damages, 42 U.S.C.A. s 1983.

2. TELECOMMUNICATIONS k498
372 ----
372V Interception or Disclosure of Communications; Electronic Surveillance
372V(A) In General
372k498 Civil liability.
N.D.Ohio 1996.
Municipalities cannot be held liable for punitive damages for violations of federal wiretap statute. 18 U.S.C.A. s 2520.

***269** John Douglas Liber, Spangenberg, Shibley, Lancione & Liber, Cleveland, OH, Bruce B. Elfvin, Barbara Kaye Besser, Elfvin & Besser, Cleveland, OH, for Jerry L. Lewis, Lorraine Lewis.

Leo R. Ward, Michael J. Smakula, Ward & Associates, Cleveland, OH, for Minerva Village, Minerva Police Dept.

Orville L. Reed, III, Buckingham, Doolittle & Burroughs, Akron, OH, Martin R. Hulthen, William D. Dowling, Oldham & Dowling, Akron, OH, for GTE North, Inc.

Steven William Ritz, Todd M. Raskin, Kimberly A. Brennan, Mazanec, Raskin & Ryder, Solon, OH, Leo R. Ward, Michael J. Smakula, Ward & Associates, Cleveland, OH, for Richard L. Taff.

Leo R. Ward, Michael J. Smakula, Ward & Associates, Cleveland, OH, for David Harp.

MEMORANDUM OPINION AND ORDER

DOWD, District Judge.

I. INTRODUCTION

The Court issued a memorandum opinion on July 12, 1996 (Docket No. 118) granting the plaintiffs' motion for summary judgment with respect to liability on its claim that several defendants, including the Village of Minerva, intercepted their telephone communications in violation of the federal wiretap statute, 18 U.S.C. s 2520 ("Section 2520"). (FN1) The Court noted in its opinion that while it was well settled that municipalities were not liable for punitive damages for constitutional violations under 42 U.S.C. s 1983, there appeared to be little if any authority on the issue of whether municipalities could be liable for punitive damages for direct violations of the wiretap statute. The Court ordered the plaintiffs and the Village to brief the issue of whether a municipality can be held liable for punitive damages under Section 2520. Upon consideration of the briefs, the relevant case law, and public policy concerns, the Court finds that punitive damages are not available from municipalities for violations of the federal wiretap statute.

II. DISCUSSION

[1] In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that municipalities could be directly liable for monetary, declaratory, and injunctive relief under

42 U.S.C. s 1983 ("Section 1983"). However, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), the Supreme Court made clear that such liability does not extend to liability for punitive damages. While the extent of municipal liability is not in doubt for Section 1983 actions, there is no such clarity on a municipality's liability for punitive damages when it is sued directly, as is the case in the instant action.

[2] The federal anti-wiretap statute, 18 U.S.C. s 2510 *et seq.*, provides for civil damages against those who violate its provisions. Section 2520 provides in relevant part:

> s 2520. Recovery of civil damages authorized
> (a) In general.-- ... [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.
> (b) Relief.--In an action under this section, appropriate relief includes
>
> * * * * * *
>
> ***270** (2) damages under subsection (c) (FN2) and punitive damages in appropriate cases; ...

18 U.S.C. s 2520. Neither party has cited a case addressing whether punitive damages can be imposed upon a municipality under Section 2520. The Court is not of the

view that *City of Newport* 's prohibition of punitive damages against municipalities in Section 1983 actions is controlling on a Section 2520 case. However, the Court believes an analysis of the Supreme Court's rationale in *City of Newport* is relevant.

In *City of Newport,* the Supreme Court engaged in a discussion of historical and policy factors before holding that a municipality is immune from punitive damages for Section 1983 violations of its officials. It noted that when the Civil Rights Act was enacted in 1871, "the immunity of a municipal corporation from punitive damages at common law was not open to serious question." *City of Newport,* 453 U.S. at 259, 101 S.Ct. at 2756. Noting that the common-law tradition of immunity was best expressed in the language of the opinions themselves, the Court cited *McGary v. President & Council of the City of Lafayette,* 12 Rob. 668 (La.1846), a case in which the city officials were found to have acted maliciously in violating an injunction and ordering the demolition of the plaintiff's house. Reasoning that the sins of the city officials should not be visited upon the taxpayers, the Louisiana Supreme Court explained:

> Those who violate the laws of their country, disregard the authority of the courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case ..., being evidently vindictive, cannot, in our opinion, be sanctioned by this

> court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

12 Rob. at 677 (quoted in *City of Newport*, 453 U.S. at 261, 101 S.Ct. at 2756). Given the strong common-law precedent against punitive damages for municipalities, the Supreme Court proceeded on "the familiar assumption that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263, 101 S.Ct. at 2758 [quotation omitted]. Nothing in the language of the statute or the legislative history hinted that Congress so intended, according to the Court. *Id.* at 263-66, 101 S.Ct. at 2757-59.

Beyond the lack of evidence Congress intended to depart from the common-law tradition, strong public policy considerations mitigated against imposing punitive liability upon municipalities, according to the Supreme Court:

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party.... Indeed, punitive

damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. ***271** A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

Id. at 266-67, 101 S.Ct. at 2759-60 [emphasis in original] [citations omitted].

Thus the Supreme Court based its rationale in *City of Newport* on two factors: 1) the fact that Congress, in enacting Section 1983, did not upset common-law tradition against municipal liability for punitive damages; and 2) public policy concerns mitigated against burdening the taxpayers with the punishment more properly imposed directly on the public officials. Application of those two factors to the instant case compels this Court to conclude that municipal liability for punitive damages is no more

appropriate in the context of the wiretap statute than it is in the context of Section 1983.

Plaintiffs argue that Congress, in enacting the wiretap statute, could have carved out an express exception for municipalities, as it did in the Civil Rights Act of 1991, (FN3) but that it did not do so. They argue that reading an exemption for municipalities into the statute would be tantamount to amending the law. However, as the Supreme Court demonstrated in *City of Newport, supra,* the lack of an express exemption is not dispositive. (FN4) Moreover, as with the legislative history of Section 1983, the legislative history of the wiretap statute indicates no desire to impose liability upon municipalities for punitive damages. (FN5) Thus the failure of a statutory exemption for punitive damages for municipalities is not overly persuasive.

Plaintiffs' efforts in arguing that the Supreme Court's rationale under Section 1983 should not apply to Section 2520 are no more persuasive. They fail to explain how the historical tradition against imposing punitive liability upon municipalities has changed; in fact, they cite not a single case subjecting a municipality to punitive damages. (FN6)

Additionally, plaintiffs argue that allowing punitive damages would compel municipalities to ensure that their employees do not ***272.** engage in unlawful wiretapping. However, municipalities act only through their officials. It seems unlikely that those officials, whose illegal acts put themselves at personal risk for punitive damages when sued in their individual capacities, will act any more carefully with

the knowledge that they are also putting the taxpayers at risk. *See City of Newport,* 453 U.S. at 268, 101 S.Ct. at 2760 ("[I]t is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality.") A "more effective means of deterrence" is imposing punitive damages on "the offending official, based on his personal financial resources." *Id.* at 269, 101 S.Ct. at 2761.

Neither the plaintiffs nor the Village have cited a case directly on point. The Court has discovered an unpublished opinion, *Abbott et al. v. Village of Winthrop Harbor et al.*, 1995 WL 51553 (N.D.ILL.1995), in which the plaintiffs sued a municipality and its officials for violations of Section 2520. The district court dismissed the punitive damages claims against the village based upon the following rationale:

> First, both Section 1983 and the Federal Wiretap Act were enacted with primary purposes of compensation for the wronged individual and deterrence of public servants from abusing their positions. [citations omitted]. Second, these plaintiffs may recover statutory or actual damages from either the Village or [the police chief] or both. Third, it serves no useful function to force municipal taxpayers to shoulder the punitive burden of one of their official's alleged wrongdoing where there are no allegations that the taxpayers knew about or endorsed the official's behavior.

Id. at *11. Thus the only case directly on point supports the proposition that it is inappropriate to impose punitive damages liability upon a municipality for a violation of the federal wiretap statute. (FN7)

III. CONCLUSION

The long history of exempting municipalities from punitive damages, the lack of an affirmative act by Congress in imposing such liability upon municipalities, and strong public policy considerations convince the Court that it is inappropriate to consider a punitive damages claim against the Village of Minerva.

In holding that punitive damages claims shall not go forward against the village, the Court does not hold or imply that such claims shall go forward against the other defendants. The Court reserves its ruling with respect to other defendants until a time closer to trial.

IT IS SO ORDERED.

FN1. Plaintiffs' motion was granted with respect to the Village; its administrator, David Harp; and its former police chief, Richard Taff. The motion was denied with respect to defendant GTE North, Inc., and GTE North's cross-motion for summary judgment was granted. The Court has since granted plaintiffs' motion for a declaration pursuant to Rule 54(b) that there is no just reason for delay with respect to the ruling in favor of GTE North.

FN2. These damages are generally restricted to the greater of $100 a day for each day of violation or $10,000.

FN3. In enacting the Civil Rights Act of 1991, Congress for the first time provided for money damages in Title VII cases. The 1991 act includes the following language: "A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. s 1981a(b)(1) (emphasis added).

FN4. Section 1983 contains no express exemption for municipal liability for punitive damages.

FN5. The wiretap statute originally passed as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Plaintiffs point out that the legislative history indicates Congress, when amending the wiretap statute in 1986, considered but ultimately rejected a proposal to delete the punitive damages provision in the statute. Plaintiffs argue that Congress' failure to specifically exempt municipalities from the punitive damages provision is dispositive. The Court disagrees. Plaintiffs point to nothing in the legislative history indicating Congress even pondered the question of

municipal liability, and the Court is of the view that "Congress would have specifically so provided had it wished to abolish the [immunity] doctrine." *City of Newport,* 453 U.S. at 263, 101 S.Ct. at 2758 [quotation omitted]. The fact that Congress, five years later, specifically exempted municipalities from punitive liability in another statute is not sufficient to support a conclusion that Congress chose to hold municipalities so liable under the wiretap statute.

FN6. Plaintiffs cite the following quotation from *City of Newport,* 453 U.S. at 267-68, 101 S.Ct. at 2760: "The Court previously has indicated that punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights, *Carey v. Piphus,* 435 U.S. 247, 257, n. 11, 98 S.Ct. 1042, 1049, n. 11, 55 L.Ed.2d 252 (1978), ..." However, neither the cited *Carey* footnote nor the cases listed therein involved the issue at hand, i.e., whether municipalities should be liable punitive damages.

Moreover, a footnote in *City of Newport* hinted at the level of egregiousness necessary to hold a municipality liable for punitive damages: "It is perhaps possible to imagine an extreme situation where the taxpayers are *directly responsible for perpetrating an outrageous abuse of constitutional rights.* Nothing of that kind is presented by this case." *City of Newport,* 453 U.S. at 267 n. 29, 101 S.Ct. at 2760 n. 29 (emphasis added). The Supreme Court, albeit in a Section 1983 context, implies that it would take direct

acts of wantonness by the taxpayers to support a claim for punitive damages against a municipality. Plaintiffs have not explained why such rationale is not equally applicable to a violation of Section 2520.

***272_** FN7. *See also Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir.1991), in which the Third Circuit held that a municipality could not be held liable for damages, including mandatory punitive and treble damages, under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. s 1961 *et seq.* In reasoning that a municipality could not form the requisite *mens rea* under the Act, the court relied extensively upon the long tradition of exempting municipalities from punitive liability: "For well over a century, most jurisdictions have recognized the principle that municipalities ... are exempt from punitive damages, unless a statute expressly provides such damage awards against municipalities." *Id.* at 910 (citing, *inter alia, City of Newport,* 453 U.S. at 260, 101 S.Ct. at 2756). The case illustrates how courts borrow from the rationale enunciated in *City of Newport* in determining whether municipalities are liable for punitive damages under statutes other than Section 1983.